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In the Supreme Court of the United States

October Term, 1975
No. 75-59

ELIZABETH M. BRADY,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1. The Petitioner, Elizabeth M. Brady, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 11, 1975.

Opinion Below
Jurisdiction
Question Presented

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the United States Tax Court also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 11, 1975. A timely petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether an anticipated loss of income can be allowed under the Internal Revenue Code, Section 165, as a deduction when the cause for the anticipated loss does not occur as a result of the complaining party's action?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1254(1)—COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

26 U.S.C. 7442—JURISDICTION

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926. (Aug. 16, 1954, c. 736, 68A Stat. 879.)

26 U.S.C. 6214—DETERMINATION BY TAX COURT

(a) *Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax*—Except as provided by Section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax should be assessed, if claim there-

for is asserted by the Secretary or his delegate at or before the hearing or a rehearing.

(d) *Final decisions of tax court*—For purposes of this chapter, the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of Section 7481.

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

Section 165—LOSSES

(a) *General Rule*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

RULES OF PRACTICE AND PROCEDURE UNITED STATES TAX COURT

Rule 120—JUDGMENT ON THE PLEADINGS

(a) *General*—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. The motion shall be filed and served in accordance with the requirements otherwise applicable. See Rules 50 and 54. Such motion shall be disposed of before trial unless the Court determines otherwise.

(b) *Matters outside pleadings*—If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 121, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 121.

STATEMENT OF CASE

Elizabeth M. Brady, the Petitioner in this action, timely filed her individual income tax returns for the calendar years of 1967 and 1968. In each return, the Appellant claims a loss deduction under Section 165(a) of the Internal Revenue Code in the amount of $1,080.00, representing the loss of annual rent for a unit she owned as a business property.

Petitioner alleges that the loss of rents for each of these years was caused by a public official failing to properly perform his duties. The basis for this allegation is the failure of the local plumbing inspector in the township in which Ms. Brady lives to properly inspect and approve the corrections made to her main sewer line. As a result of the vacuum in the State law to provide an appeal channel to a technically trained body at higher levels of Government, those licensed individuals failed to provide the proper service and such failure was not remedied because of the lack of the appeal channel. This combination of circumstances resulted in the denial of Appellant's human rights, environmental rights, pursuit of happiness, and owner of rental property by failure of the law to serve on such a technical and vital matter.

The immediate issue in this case is the two tax deficiencies which the Internal Revenue Service claims are due for the years of 1967 and 1968. They are respectively: $209.77 due from 1967 and $223.36 due from 1968.

Statement of Case

Petitioner originally brought this action after having exhausted her administrative remedies with the Internal Revenue Service, in the United States Tax Court. The case was dismissed under Rule 20 of the Rules of Practice and Procedure of the Tax Court, civil action number 2717-71 on June 26, 1974, by the Honorable C. Moxley Featherston.

REASONS FOR GRANTING THE WRIT

It Was Error for the Tax Court To Dismiss the Petitioner's Claim as Not Within the Scope of Section 165 of the Internal Revenue Code

The message from Section 165 of the Internal Revenue Code is clear and unambiguous; if the loss is anticipated and a closed transaction does not exist, the taxpayer can not take advantage of the loss by deducting it from her gross income for tax purposes. The Supreme Court has ruled on this issue on at least one occasion in *Hort vs. Commissioner*, 313 U.S. 28 (1940). In that case, the Court held that the cancellation of a lease could not be used in the form of a deduction from gross income.

However, the equities in the instant case demand that an exception be carved into the language of Section 165. Herein, Petitioner was deprived of rental income, not by her own negligence or within her control, but by the failure of the plumbing inspectors to inspect and approve the main sewer drainage work done on her premises. Petitioner tried in vain for years to remedy this situation without success. During this time, Petitioner lost income she would otherwise have received from the rental property. Therefore, the Petitioner feels that a reading of Section 165 of the Internal Revenue Code as interpreted by *Hort*, supra, works too harsh a result in the instant case. Petitioner will admit that she does not have an ascertained

loss. The procurement of an ascertained loss during the period of this repair of the main drainage system was impossible. Nonetheless, Petitioner was deprived of rental income during this period.

Thus Petitioner requests the Supreme Court to review Section 165 of the Internal Revenue Code, not to determine its constitutionality, but to determine whether an exception can be carved out of the statutory language in order to permit a loss to be deducted where the cause of the loss is not through the Petitioner's action or omission to act and where the cause for the loss is totally beyond the control of the Petitioner.

Conclusion

For the reasons listed above, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

LEE MANDELL,
Counsel for Petitioner
1616 Two Penn Center Plaza
Philadelphia, Pa. 19102

APPENDIX

T. C. Memo. 1974-171
UNITED STATES TAX COURT

Elizabeth M. Brady, Petitioner v. Commissioner of Internal Revenue, Respondent

Docket No. 2717-71
Filed June 26, 1974

Lee Mandell, for the petitioner.
Howard W. Gordon, for the respondent.

MEMORANDUM OPINION

FEATHERSTON, Judge: This case involves the following income tax deficiencies determined by respondent:

1967	$209.77
1968	$223.36

Respondent has filed a motion for judgment on the pleadings under Rule 120 of the Rules of Practice and Procedure of this Court.

The petition alleges that respondent erred in disallowing a deduction under section 165, Internal Revenue Code of 1954, for the loss of rental income in the amount of $1,080 in each of the years in controversy. The facts alleged in support of this assignment of error, briefly summarized, are that petitioner in 1956 purchased a house with a rentable second-floor apartment. She was unable to rent the apartment during 1967 and 1968 due to defective plumbing which had been approved by a city plumbing inspector. She attempted to have the plumbing repaired, but licensed plumbers declined to do the required work. The allegations in the petition conclude:

> 5. (f) The combination of the foregoing circumstances together with the failure of the public official and the absence of any right to appeal his determinations has resulted in the casualty loss of rent of a very rentable second floor apartment, claimed under Schedule B in petitioner's Returns.
>
> (g) The tax deduction is based on the loss of rent from the second floor, which in dollars is roughly one-third to one-quarter of the deduction, depending on the tax rate.

* * * * * * *

Even if all allegations of fact in the petition are true, section 165 of the Code does not permit the claimed deductions. Subsection (a) of that section allows a deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." However, that section is addressed to losses actually sustained from closed and completed transactions fixed by identifiable events, not to losses of anticipated income. "Noth-

ing in * * * [section 165] indicates that Congress intended to allow petitioner to reduce ordinary income actually received and reported by the amount of income * * * [she] failed to realize." *Hort v. Commissioner*, 313 U.S. 28, 32 (1941). We find no merit in petitioner's argument that the law on this point is unclear where the loss of anticipated income arises from the action of a third party and the taxpayer receives no compensation for the claimed "loss". *Frank F. Nicola*, 1 B.T.A. 487 (1925).

Accordingly, the motion for judgment on the pleadings will be granted, and *Decision will be entered for the respondent.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2108

ELIZABETH M. BRADY,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. 2717-71)

Appeal From Judgment of the United States Tax Court

Submitted under 3rd Cir. Rule 12(6) April 10, 1975
Before McLaughlin, Van Dusen and Aldisert,
Circuit Judges

Lee Mandell, Esq., Philadelphia, Pa., Attorney for Appellant.

Scott P. Crampton, Assistant Attorney General; Gilbert E. Andrews, Bennet N. Hollander & William A. Whitledge, Attorneys; Tax Division, U. S. Department of Justice, Washington, D. C., Attorneys for Appellee.

Order of the Court of Appeals

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court:
(s) Van Dusen
Circuit Judge
Attest:
(s) Thomas F. Quinn, *Clerk*

Dated: Apr 11 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-59

ELIZABETH M. BRADY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented by the petition is whether petitioner is entitled to deductions for a "loss" in 1967 and 1968, which allegedly arose when she was unable to realize rental income from part of her property because of the action of state and local officials.[1] The Tax Court upheld the Commis-

[1] In a previous refund suit in the Eastern District of Pennsylvania, petitioner claimed a similar deduction. In an unreported order, the district court dismissed her complaint. The

sioner's disallowance of the deduction (Pet. App. 9-11), and the court of appeals affirmed by order (Pet. App. 12-13).

It is well established that the failure to realize income does not produce a deductible loss. *Hort* v. *Commissioner*, 313 U.S. 28. Petitioner does not claim that the *Hort* decision was erroneous, but seeks review in order to have an exception to the statute "carved out" (Pet. 8). However, deductions allowed by the tax laws are purely a matter of "legislative grace," fully within the province of the Congress, and a taxpayer seeking a deduction must "be able to point to an applicable statute and show that he comes within its terms." *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440. Since petitioner acknowledges (Pet. 7) that the decision below is in accordance with the terms of the statute, there is no occasion for further review.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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court of appeals affirmed (order, C.A. 3, December 11, 1974), and this Court denied certiorari on May 19, 1975 (No. 74-1100).

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